

JUSTICE FOR ATROCITY CRIMES

Lessons of International Support for Trials before
the State Court of Bosnia and Herzegovina



Justice for Atrocity Crimes
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the State Court of Bosnia and Herzegovina

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Summary

Spurred in part by the impending closure of the International Criminal Tribunal for the former Yugoslavia (ICTY), in 2003 the Office of the High Representative in Bosnia and Herzegovina (OHR), together with the Yugoslav tribunal, pushed for the creation of a specialized War Crimes Chamber at the state level to try atrocity crimes stemming from the 1992-1995 Bosnian war. A crucial component of the project was the temporary inclusion of international judges in the chamber and international prosecutors in the Special Department for War Crimes (SDWC) of the Prosecutor's Office to bolster capacity to do this effectively. Following the adoption of the relevant laws by the Bosnian authorities, the War Crimes Chamber began operations in March 2005.

Seven years later, most of those interviewed for this report confirmed that international judges and prosecutors have encouraged public faith in the impartiality and in the day-to-day work of both institutions. For instance, international prosecutors have played a key role in investigating and prosecuting serious cases that would have likely remained unaddressed because of their sensitivity. Good working relationships have developed between many national and international judges, and some national and international prosecutors, which has facilitated the transfer of knowledge and skills. Overall, the SDWC and the chamber have processed an impressive number of cases: since its creation, the court has completed over 200 cases involving serious violations of international law. This accomplishment is due in large part to the dedication of national and international staff in the chamber and the SDWC to see justice for the worst crimes realized in fair proceedings. The Bosnian model of international support for a national court has proven itself to be a viable alternative to purely national trials where there are concerns about capacity, independence, or impartiality.

However, this model of providing international assistance has not been without flaws. With the benefit of hindsight, many of those interviewed for this report expressed a common criticism: from the outset, the international community and the Bosnian authorities had no strategic vision to maximize the benefits of international staff. While international involvement has undoubtedly brought benefits, many interviewees said that international policymakers, donors, and the Bosnian authorities had missed opportunities to realize the full potential offered by the involvement of international staff in the SDWC and the chamber. In retrospect, it would have been useful for policymakers and donors working closely with

national authorities to devise ways to make the most of the presence and experience of international staff as early as possible given the deteriorating political climate in Bosnia and the shrinking appetite of politicians to tolerate international staff in judicial institutions.

This report discusses three broad areas where international policymakers, donors, and national authorities could have better utilized international staff and resources: knowledge transfer, institution building, and transition strategy. Valuable lessons have emerged in each of these areas that could help improve the impact of international support in future institutions elsewhere.

While there have been successes in knowledge transfer in some areas of the court, notably among judges, the results have been more limited within the Special Department for War Crimes in the Prosecutor's Office. This is in part because neither the international community nor the Bosnian authorities had a vision for international prosecutors beyond handling complex and sensitive cases. Such cases are of course important and international prosecutors have made a considerable impact in handling them, including those cases transferred by the ICTY. However, little attention has been paid to encouraging teamwork and information sharing between international and national prosecutors, limiting the opportunities for international and national staff to share skills. The SDWC has not consistently pursued simple solutions, like pairing international prosecutors with national legal officers (instead of only international legal officers), using knowledge transfer as a criterion to evaluate the performance of international and national prosecutors, and holding regular meetings to encourage office cohesion.

In the beginning the international community and the Bosnian authorities paid little consideration to recruiting international staff with experience in institution building. The SDWC in particular did not direct enough attention to the mundane tasks associated with setting up an office that can function effectively after international staff leave (such as putting in place standard operating procedures and developing policies to encourage consistency in investigations and prosecutions). Later attempts by international staff to improve upon the weak infrastructure were not sustained. Similarly, for several years the SDWC did not develop a clear or consistent strategy to prioritize the processing of cases. The resulting lack of coherence took a toll on the office's legitimacy in the eyes of the public. Further, serious shortcomings in creating a functioning witness protection program—a task which the international community and Bosnian officials are only now

addressing in Bosnia—underscores just how much importance policymakers, donors, and national authorities should afford to institution building at the outset.

The transition strategy devised by the international community and the Bosnian authorities to phase out all international staff within five years proved to be unworkable, particularly in the SDWC. Considering some investigations can take years to complete, five years is simply not enough time for international prosecutors to make significant headway in processing complicated and politically sensitive cases. In 2009, despite widespread recognition by a number of key actors—including the domestic body mandated to implement the transition strategy and the president and prosecutor of the ICTY—of the need to extend the mandates of international judges and prosecutors, there was no consensus in the Bosnian parliament to do so. As a result, the high representative stepped in at the last minute to unilaterally extend the tenure of international judges and prosecutors by three years. Rather than setting an arbitrary deadline, policymakers, donors, and national authorities in other country situations developing an exit strategy for international staff would do well to consider establishing benchmarks linked to progress in handling cases and to the development of an institutional framework. The achievement of these benchmarks would then trigger the phasing out of international staff.

Bosnia's experience in trying atrocity crimes also highlights the importance of engaging public opinion. The public appetite for justice in Bosnia as dispensed by the War Crimes Chamber and the Special Department for War Crimes has shrunk over time. As ethnic fissures in Bosnia's political landscape have grown deeper and more pronounced, several vocal and influential politicians have questioned the legitimacy of the SDWC and the court because of an alleged anti-Serb bias. As a result, public confidence has eroded significantly, particularly among Bosnian Serbs. Initial weaknesses in the outreach and communications strategies left the SDWC and the court ill-equipped to effectively address these misperceptions. An important lesson from Bosnia therefore is that it is essential for judicial institutions to develop strong outreach programs early on to address misperceptions and to proactively and consistently inform the public about key decisions, developments, and policies.¹

¹ It is worth noting that the Yugoslav tribunal only arrived at the realization about the important role of outreach relatively late in its mandate: while its first indictments were issued in late 1994 and early 1995, its outreach program was only established in 1999. By that time, it had already suffered considerable reputational damage in the former Yugoslavia. See Judge Gabrielle Kirk McDonald, President, ICTY, speech given at the Council on Foreign Relations, New York, May 12, 1999, <http://www.icty.org/sid/7766> (accessed February 7, 2012).

A final lesson from Bosnia is the need for national authorities, with support from donors, to strengthen coordination between a central court staffed with international experts and other national courts in a situation where the sheer volume of cases makes jurisdiction sharing inevitable. Policymakers, donors, and national authorities should give careful consideration from the beginning to allocating resources and expertise to improve the capacity of all courts trying atrocity crimes. This could be achieved, for instance, if national authorities vested only a handful of courts with jurisdiction to try atrocity cases, and developed a concrete, written strategy that identified practical ways to help guide the investigation, prosecution, and trials of atrocity crimes in a coordinated manner (for example, establishing guidelines on how cases are allocated and developing witness protection capacity that functions in all courts). Developing a coordinated approach can help maximize the return on efforts—and donor dollars—aimed at closing the impunity gap for atrocity crimes.

This report outlines the lessons identified above and offers recommendations which may be of use in situations where the placement of international judges, prosecutors, and other professionals is being considered or will be in the future. There is, of course, no one-size-fits-all model, but it is hoped that the experiences in Bosnia outlined in this report can help inform efforts of policymakers and donors to support national efforts to bolster capacity and willingness to try serious international crimes elsewhere.

Recommendations

Specific Recommendations for Bosnia and Herzegovina

To the Special Department for War Crimes

- Develop more refined criteria to prioritize the selection of cases and ensure their consistent implementation.
- Consider assigning national legal officers to work with international prosecutors as a matter of practice.
- Hold regular office-wide meetings to discuss novel and substantive issues that emerge in cases.
- Develop and enforce clear reporting lines of authority within the office.
- Identify areas where practices and policies should be standardized and take steps to develop rule books and other internal governance instruments to encourage consistency in the processing of atrocity cases.

To the War Crimes Chamber

- Support efforts by the Registry to improve outreach and communications efforts, including by participating in outreach activities as requested.

To the Public Information and Outreach Section of the War Crimes Chamber Registry

- Improve the court's outreach and communications strategy to make the court's work better understood by the public.

To the Government of Bosnia and Herzegovina

- Allocate the necessary financial and human resources to the War Crimes Chamber and the Special Department for War Crimes to ensure a smooth and responsible transition from international to national staff.
- Ensure the passage of the 2011 Draft Witness Protection Program Law and allocate resources to the State Investigation Protection Agency's Witness Protection Unit as needed to provide effective protection.
- Ensure the War Crimes Chamber and the Special Department for War Crimes have the resources necessary to improve their respective outreach and communications strategies.

To All Political Parties in Bosnia and Herzegovina

- Refrain from politically-motivated attacks on the War Crimes Chamber and Special Department for War Crimes.

To Donors

- Provide financial resources as necessary to the War Crimes Chamber and the Special Department for War Crimes to promote the smooth and responsible transition of both organs to purely national institutions.
- Provide the necessary resources to the cantonal and district courts to prosecute and try atrocity cases.
- When providing education opportunities for judges and prosecutors, ensure such programs correspond with identified need, and are open to those working in district and cantonal courts as well as those at the state level.

General Recommendations for Governments, Intergovernmental and International Institutions, and Donors Pursuing Domestic Trials for Atrocity Crimes in Post-conflict Transitions

Where International Judges and Prosecutors are Considered Necessary to Bolster National Capacity to Handle Atrocity Crimes

- Recruit international judges and prosecutors with relevant experience in criminal law.
- Clearly articulate in their job descriptions and in the evaluation process that international judges and prosecutors are expected to contribute to the transfer of knowledge and institution building.
- Ensure training opportunities offered to international and national judges, prosecutors, and other staff address identified needs.
- Where the use of international prosecutors is being contemplated, consider the merits of putting an international prosecutor in charge of a prosecutor's office, vesting him or her with decision-making authority in specified areas for a limited period of time and with a clear exit strategy, and mandating collaboration with national prosecutors from the outset.

Defense

- Ensure that defense attorneys have access to the substantive support they need to ensure an equality of arms.

Witness Protection

- Prioritize capacity development and provide resources as needed to effectively protect and support witnesses inside and outside of the courtroom.

Transition Strategy

- When considering exit strategies for international judges, prosecutors, and other staff, rather than adopting an arbitrary timeline, national governments and international actors should collaborate to identify relevant benchmarks to assess performance and capacity to prosecute and try atrocity cases at the national level. Relevant benchmarks could include the development of a prosecutorial strategy to prioritize cases and its consistent implementation, the number of complex and sensitive cases tried to a final verdict, and whether the national political climate favors accountability.
- Devise a body that includes national and international stakeholders to determine when identified benchmarks have been satisfied.

Outreach and Communications

- Highlight with prosecution and court officials the importance of developing and implementing an effective outreach and communications strategy.
- Provide resources as needed to promote effective outreach and communications efforts.

Addressing Challenges Where Jurisdiction is Shared across Multiple Courts

- Consider developing a strategy early on to effectively share resources and cases across multiple courts. The implementation rate of the strategy could be a trigger for the phasing out of international staff.
- Support efforts to comprehensively map atrocity crimes early on, both to help inform the prosecutorial strategy for case selection and to help allocate prosecutorial resources more effectively.
- Where possible, ensure that all courts handling atrocity cases are embedded within the national judicial hierarchy to promote the development of coherent jurisprudence and the rule of law.

Methodology

The report is based primarily on a mission Human Rights Watch conducted in Sarajevo in June 2011. During the mission we interviewed national and international staff in the following institutions: the Special Department for War Crimes of the Prosecutor's Office, the War Crimes Chamber of the State Court including members of the judiciary, Odsjek Krivicne Odbrane (the independent defense support office), the Registry of the State Court, the Public Information and Outreach Section of the court, the Witness Support Office of the court, and the State Investigation and Protection Agency of Bosnia.

Further, we interviewed officials from organizations outside of the chamber and the SDWC, including the Organization for Security and Co-operation in Europe (OSCE), the Bosnian High Judicial and Prosecutorial Council (HJPC), the United Nations Development Programme (UNDP), the Office of the High Representative (OHR), the International Criminal Investigative Training Assistance Program (ICITAP), and the Witness Protection in the Fight against Serious Crime and Terrorism Project (WINPRO). In addition, we interviewed officials in diplomatic missions in Sarajevo. Between July 2011 and March 2012 we conducted additional interviews in person, by telephone, or over email with officials in the chamber, former and current staff of the Special Department for War Crimes, ICITAP, and OHR.

Many of the individuals we interviewed wanted to speak candidly, but did not wish to be cited by name, so we have used generic descriptions of interviewees throughout the report to respect the confidentiality of these sources.

I. Background

Over the last two decades, the work of international criminal justice institutions such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) have raised expectations—among victims and policymakers alike—that perpetrators of war crimes, crimes against humanity, and genocide should be held to account in fair trials. As these expectations have developed, so too has the realization that these tribunals can only try a relatively small number of perpetrators because of jurisdictional and resource constraints. Credible national prosecutions and trials have emerged even more clearly as the logical next step to enhance the reach of justice.

While the need for credible national justice is clear, the path to achieve it is by no means straightforward. Even where there is political will to see perpetrators held to account—not always a given, particularly if the sitting government is implicated in abuses—the justice sector in many post-conflict states is ill-equipped to process complex and politically charged cases. International support can be essential to help national courts deliver justice.

The War Crimes Chamber in Bosnia and Herzegovina’s State Court and the Special Department for War Crimes in the Prosecutor’s Office offer important lessons for donors and policymakers when they consider how to bolster national efforts to tackle impunity.² Following the 1992-1995 war in Bosnia, those cases not tried by the Yugoslav tribunal were tried in each of the country’s constituent entities, the Federation of Bosnia and Herzegovina (cantonal courts), and the Republic of Srpska (district courts). However, efforts by the Bosnian authorities to hold perpetrators of atrocities to account proved to be ineffective because of poor case preparation by prosecutors, weak investigations, ineffective witness protection, and bias among judges and prosecutors alike.³ The introduction of a new substantive criminal code and procedural code in 2003, which incorporated key elements of the previously unfamiliar adversarial system into the criminal

² In Bosnia, the State Court and the Prosecutor’s Office operate as independent institutions. See Law on the Prosecutor’s Office of Bosnia and Herzegovina (unofficial consolidated version), in Official Gazette of Bosnia and Herzegovina, Nos. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04, http://www.tuzilastvobih.gov.ba/files/docs/zakoni/zot/s_Office_BiH_-_Consolidated_text.pdf (accessed February 8, 2012) (“Law on the Prosecutor’s Office of Bosnia and Herzegovina”), art. 2.

³ Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, vol. 16, no. 7(D), October 2004, <http://www.hrw.org/sites/default/files/reports/icty1004.pdf> (“Justice at Risk”).

procedure, raised even more concerns about Bosnia's capacity to credibly try atrocity cases.⁴ The Yugoslav tribunal's completion strategy further highlighted the need for the Bosnian authorities to strengthen domestic capacity to close the impunity gap for the thousands of cases that potentially remained.⁵

As a result, the ICTY and the Office of the High Representative developed a proposal to strengthen Bosnia's capacity to try atrocity cases.⁶ A key element of the proposal was the temporary inclusion of international judges, prosecutors, and other professionals to assist efforts to effectively adjudicate cases.⁷ The United Nations Security Council called on the international donor community to support the OHR's work to this end.⁸ The joint ICTY/OHR proposal was subsequently endorsed by the Peace Implementation Council, the international body made up of 55 states and agencies charged with implementing the terms of the Dayton Peace Agreement that ended the war in Bosnia.⁹ The Bosnian authorities adopted laws establishing the War Crimes Chamber in Sarajevo as part of the State Court, and created the Special Department for War Crimes (SDWC) as part of the Prosecutor's Office.¹⁰ The respective laws permitted the inclusion of international judges and international prosecutors for a limited period of time.¹¹

⁴ For instance, the new common law-based procedural code required prosecutors and defense attorneys to learn how to effectively cross-examine witnesses. Similarly, under the 2003 procedural code, prosecutors are responsible for conducting investigations, a function previously executed by investigating judges.

⁵ United Nations Security Council, Resolution 1503 (2003), S/RES/1503 (2003), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No3/481/70/PDF/No348170.pdf?OpenElement> (accessed February 7, 2012) ("UNSC resolution 1503"); United Nations Security Council, Resolution 1534 (2004), S/RES/1534 (2004), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No4/286/29/PDF/No428629.pdf?OpenElement> (accessed February 7, 2012).

⁶ An ad hoc international institution, the Office of the High Representative (OHR) is responsible for overseeing implementation of the 1995 Dayton Peace Agreement, which ended the war in Bosnia and Herzegovina. In coordination with the people and institutions of Bosnia and Herzegovina and the international community, the high representative is tasked with ensuring the country evolves into a peaceful and stable democracy. See <http://www.ohr.int/>.

⁷ "Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War Crimes Prosecutions," International Criminal Tribunal for the former Yugoslavia (ICTY) press release, January 15, 2003, <http://www.icty.org/sid/8312> (accessed February 7, 2012).

⁸ UNSC resolution 1503, para. 5.

⁹ "Communique by PIC Steering Board," September 26, 2003, http://www.ohr.int/pic/default.asp?content_id=30898 (accessed February 29, 2012).

¹⁰ Law on the Court of Bosnia and Herzegovina (Consolidated Version), *Official Gazette of Bosnia and Herzegovina*, No. 49/09, 2008, http://www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf (accessed February 7, 2012) ("Law on the Court of Bosnia and Herzegovina"); Law on the Prosecutor's Office of Bosnia and Herzegovina.

¹¹ Law on the Court of Bosnia and Herzegovina, art. 14(1)(a); Law on the Prosecutor's Office of Bosnia and Herzegovina, art. 3(3).

Both institutions were inaugurated in March 2005 and began operations, each with a temporary complement of international staff.¹² Given that many of the crimes during the war were committed along ethnic lines, the presence of international judges and prosecutors has proven to be important to support the institution's actual and perceived impartiality.¹³

Since it began operations, many international staff have already transitioned out of the chamber and its related institutions. For instance, the registrar (the court's chief administrative officer) is a national staff member, and the Public Information and Outreach Section and the Witness Support Office are staffed entirely by nationals. Similarly, OKO, the defense support office, is now an entirely domestic institution. However, a limited number of international prosecutors and international judges remain in the SDWC and the chamber, respectively, to handle the sensitive tasks of prosecuting and adjudicating atrocity crime cases. The shift to more national staff in the chamber and its related institutions has coincided with an increased role for the Bosnian authorities in attempting to address some of the outstanding complex issues related to closing the impunity gap (such as the development of a national strategy to coordinate the prosecution of atrocity crimes across multiple courts, discussed in section VI below).

¹² See Letter from Michael Th. Johnson, Registrar for War Crimes and Organized Crimes, Court of Bosnia and Herzegovina, June 8, 2005, http://www.registrarbih.gov.ba/files/docs/June_Progress_Report_June_2005.pdf (accessed February 7, 2012).

¹³ For earlier Human Rights Watch reports, see Human Rights Watch, *Bosnia and Herzegovina – Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, vol. 18, no. 1(D), February 2006, <http://www.hrw.org/sites/default/files/reports/ij0206webwcover.pdf> (“Looking for Justice”); Human Rights Watch, *Bosnia and Herzegovina – Narrowing the Impunity Gap: Trials before Bosnia’s War Crimes Chamber*, vol. 19, no. 1(D), February 2007, <http://www.hrw.org/sites/default/files/reports/ij0207webwcover.pdf> (“Narrowing the Impunity Gap”).

II. Knowledge Transfer

In certain areas, for example the judiciary, there has been a considerable transfer of knowledge and skills. However, in other areas, particularly within the SDWC in the Prosecutor's Office, knowledge transfer has been more limited. This is hardly surprising in light of the absence of any strategy to systematically share expertise. These areas are discussed in more detail below.

1. The Bench

International judges initially represented a majority on three-judge trial and five-judge appeals panels, with the national judge always presiding. This ratio shifted in 2008, and for a period of time there was only one international judge per panel (international judges now only sit on appeals panels). The introduction of international judges into the justice system in Bosnia was not without difficulties. Initially, the high representative appointed candidates provided by donor governments and their quality varied. For instance, some of those assigned to the chamber lacked judicial experience in their home countries.¹⁴ Others only had expertise in civil law proceedings, leaving them ill-equipped to manage the newly-introduced adversarial elements in criminal proceedings (characteristic of common law jurisdictions). This limited their ability to share useful knowledge with their national counterparts.¹⁵

Gradually, however, the situation improved. The same requirements for national judges—a minimum of eight years of criminal law experience—are now applied to the recruitment of international judges. The pool of available candidates, while smaller, is better suited to meet the needs of the justice system.¹⁶ Judges are no longer seconded by their governments; instead, the Registry, the court's administrative arm, manages a pool of donor funds to pay the salaries of those selected through a competitive process.¹⁷ Judges are now formally appointed by the High Judicial Prosecutorial Council, the independent body mandated to establish and protect the independence and impartiality of the judiciary and the Prosecutor's Office.¹⁸

¹⁴ Human Rights Watch interviews with two court staff, Sarajevo, June 20, 2011.

¹⁵ Human Rights Watch interviews with two court staff, Sarajevo, June 20 and 22, 2011.

¹⁶ Human Rights Watch interview with court staff, Sarajevo, June 21, 2011.

¹⁷ Human Rights Watch interview with court staff, Sarajevo, June 21, 2011.

¹⁸ High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC), "Frequently Asked Questions on the Council," undated, <http://www.hjpc.ba/intro/Template.aspx?cid=2301,1,1> (accessed February 7, 2012).

Over time, better working relationships have emerged on panels. This is partially due to the structure itself—judges must work together on a panel to reach a verdict, thus requiring communication and compromise among panel members. In addition, the Registry assigns judges to the same panel in numerous cases, which makes it easier to establish trust, good communication, and positive working practices.¹⁹

There have also been a number of improvements when it comes to training judges. In the early days of the court’s life, donors, development agencies, and nongovernmental organizations offered numerous trainings. However, there was little consultation with the court as to what was actually needed. With respect to those trainings offered by key donors in particular, it was difficult for the Registry and the court to refuse training programs for judges out of fear of possibly jeopardizing other funding opportunities. As a result, according to one source, judges lost valuable court time to training seminars that had very little practical application to their day-to-day work.²⁰ In addition, there was little coordination among donors on the trainings offered, which inevitably led to duplication, wasting both the judges’ time and donor funds.²¹

In 2008 the situation improved with the establishment by the court’s president of a Judicial Education Committee.²² The committee, which is chaired by an international judge, maintains a list of educational priorities, against which it assesses offers of training and selects appropriate topics based on existing needs. The committee, to the extent possible, also vets the offered program to assure its quality, potential effectiveness, and the sensitivity of the trainer.²³ It is especially important for donors to sponsor education opportunities where the trainers have some knowledge of the underlying national law, and who understand the cultural context. The committee has also developed criteria to assess which judges should attend specific trainings, injecting a measure of fairness in the selection process.²⁴ It would have been especially valuable if the president of the court or the Registry had established this committee from the beginning, when training opportunities for national and international judges were most abundant and the need was greatest.

¹⁹ Human Rights Watch interview with court staff, Sarajevo, June 20, 2011.

²⁰ Email communication from court staff to Human Rights Watch, October 7, 2011.

²¹ Email communication from court staff to Human Rights Watch, October 7, 2011.

²² Email communication from court staff to Human Rights Watch, September 7, 2011 and March 1, 2012.

²³ Email communication from court staff to Human Rights Watch, October 7, 2011.

²⁴ Email communication from court staff to Human Rights Watch, October 7, 2011.

Another important development has been the establishment by an international judge of the Judicial College—essentially, a retreat held at least once a year to address the most pressing issues facing the judiciary and to develop appropriate solutions. It includes State Court judges and judges from the cantonal and district courts.²⁵ The program was established in 2006 and has been held every year since. In 2011 the college was headed by a national judge, with 90 percent of the curriculum developed by in-house national judges.²⁶

2. Support to Defense Counsel

In 2005 the Registry established the Criminal Defense Support Section, known by its Bosnian acronym OKO (*Odsjek krivicne odbrane*), in order to provide essential support to attorneys representing defendants accused by the State Court of war crimes, crimes against humanity, and genocide. OKO has since evolved into an independent institution and is housed in a separate building from the court, although there are designated offices at the court for defense attorneys as needed. The office was initially headed by an international director and a deputy, and for a period employed a number of international law “fellows”—young lawyers with experience in international criminal law and human rights law.²⁷ OKO transitioned to a purely national institution early on with a national lawyer assuming leadership of the office in May 2007. All OKO staff members are now Bosnian nationals.

OKO has facilitated knowledge transfer in a number of important areas. For instance, OKO staff have organized regular trainings for defense counsel on relevant areas of international law and adversarial techniques, such as cross-examinations. These trainings have evolved over time to address the more refined legal and procedural questions that have emerged in trials.²⁸ When requested, OKO staff have also helped defense counsel prepare legal arguments by researching issues relating to international humanitarian law.²⁹ OKO staff have established a good working relationship with the ICTY’s Registry and its Office of Legal Assistance for the Defense. Staff have helped defense attorneys access confidential ICTY material, such as statements of protected witnesses, as well as non-

²⁵ See Human Rights Watch, *Narrowing the Impunity Gap*, p. 55.

²⁶ Email from court staff to Human Rights Watch, October 7, 2011.

²⁷ Odsjek Krivicne Odbrane (OKO), “International Assistance,” undated, <http://www.okobih.ba/?opcija=sadrzaj&id=4&jezik=e> (accessed February 7, 2012).

²⁸ Human Rights Watch interview with OKO staff, Sarajevo, June 23, 2011.

²⁹ Human Rights Watch, *Narrowing the Impunity Gap*, p. 22.

confidential witness statements, transcripts, and judgments.³⁰ OKO's role in facilitating access to ICTY material is particularly important for national lawyers who are not fluent in English as OKO translates ICTY material into local languages.³¹

The OKO model for sharing knowledge and providing support to defense attorneys has been, for the most part, successful.³² Aside from the transfer of knowledge and skills, one source emphasized that employing an international lawyer as the director from the beginning was effective in helping to shield the office from accusations of nationalist bias.³³ OKO staff lawyers are not members of the national bar and cannot appear in court (since bar membership is not available to lawyers working for employers outside of law firms),³⁴ so there is less of a sense of competition with national defense attorneys when it comes to managing client files. This has also prevented the emergence of conflicts of interest between OKO and its clients.³⁵ In particular the support provided through OKO has also helped to promote the equality of arms—the idea that the defense should never be placed at a substantial disadvantage vis-à-vis the prosecution in terms of its ability to present its case—since, for the most part, only national attorneys represent accused before the War Crimes Chamber.³⁶

Despite the quality of OKO's trainings and support, the office was underutilized, particularly in the first years after it was established.³⁷ More explanation of the office's mandate and its available services—by OKO and the court's Registry—would have been helpful from an early stage to promote its use. Another important area that has improved

³⁰ Human Rights Watch interview with OKO staff, Sarajevo, June 23, 2011.

³¹ Human Rights Watch interview with OKO staff, Sarajevo, June 23, 2011.

³² Human Rights Watch, *Narrowing the Impunity Gap*; International Center for Transitional Justice, "The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court," 2008, <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf> (accessed February 7, 2012) ("ICTJ report"); International Criminal Law Services, "Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009," December 15, 2008, <http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf> (accessed February 7, 2012) ("ICLS report").

³³ Human Rights Watch interview with OKO staff, Sarajevo, June 23, 2011.

³⁴ ICTJ report, p. 15.

³⁵ However, OKO staff members can receive the power of attorney from defense counsel, allowing them to receive case files, sit in the courtroom behind the defense, and attend closed sessions. ICTJ report, p. 15.

³⁶ There are some instances in which international defense attorneys have appeared for defendants, such as in cases transferred to the chamber from the ICTY under rule 11 *bis* of the Yugoslav tribunal's Rules of Procedure and Evidence. Human Rights Watch interview with OKO staff, Sarajevo, June 23, 2011.

³⁷ Human Rights Watch, *Narrowing the Impunity Gap*, pp. 27-29.

over time is OKO's role in accessing ICTY material: initially, under the ICTY's rules, only the ICTY Office of the Prosecutor could approach the tribunal's judges to alter protective measures as needed to release the requested information. OKO staff thus had to rely on the ICTY prosecutors to defend their interests. This process was cumbersome and the timing of results unpredictable.³⁸

The ICTY Rules of Procedure and Evidence have since been amended to allow defense counsel to address the tribunal's judges through OKO rather than needing to direct the request through the ICTY Prosecutor's Office.³⁹ Lessons learned from the evolving relationship between OKO and the ICTY in improving access for defense counsel appearing before the chamber may be particularly relevant for the International Criminal Court (ICC). Where an international court has evidence in its possession that can facilitate credible national prosecutions, it should make efforts to ensure the defense has a viable avenue to access such material as well.

3. Prosecutor's Office: Special Department for War Crimes

Initially, there were five international prosecutors in the Special Department for War Crimes (SDWC) assigned to five of the six regional prosecution teams in the office.⁴⁰ Each team was "mixed," meaning it had at least one national prosecutor. A national prosecutor headed each team.⁴¹ International prosecutors have made real headway in investigating and prosecuting complex cases that would likely have remained untouched by their national colleagues because of security concerns.⁴² However, despite the mixed nature of the teams, collaboration between national and international prosecutors was never systematic and when it occurred, it was informal.⁴³ Over time this collaboration has proven to be very limited. As of June 2011, with four international prosecutors in the office, the situation remained relatively unchanged.⁴⁴

³⁸ Human Rights Watch, *Narrowing the Impunity Gap*, p. 25.

³⁹ Human Rights Watch interview with OKO staff, Sarajevo, June 23, 2011.

⁴⁰ In 2007, a sixth international prosecutor was added to the office. See Human Rights Watch, *Narrowing the Impunity Gap*, p. 6.

⁴¹ Human Rights Watch, *Looking for Justice*, p. 8.

⁴² Human Rights Watch interview with SDWC staff, Sarajevo, June 20, 2011; Email communication from SDWC staff to Human Rights Watch, January 26, 2012. Further, four of the six cases transferred by the ICTY to the SDWC were handled by international prosecutors. See David Schwendiman, "Capacity Building: The Institutional War Crimes Legacy of the ICTY and the International Donor Community in Bosnia and Herzegovina," in Richard H. Steinberg, ed., *Assessing the Legacy of the ICTY* (Leiden: Martinus Nijhoff, 2011), p. 225 ("Capacity Building").

⁴³ Human Rights Watch, *Narrowing the Impunity Gap*, pp. 6-7. See also ICLS report, para. 105.

⁴⁴ Human Rights Watch interview with two SDWC staff, Sarajevo, June 20 and 22, 2011.

The lack of systematic knowledge transfer is linked to the fact that it was simply not in the job description of international prosecutors to educate their national colleagues on their substantive areas of expertise.⁴⁵ This has led to uneven—and unfortunately, limited—knowledge transfer. Communication and collaboration within teams, fundamental to trading skills, is not institutionalized but depends on the individual personalities of the prosecutors.⁴⁶

That is not to suggest national prosecutors lack the skills to process complex investigations and prosecutions. After seven years, national prosecutors have developed the skills and knowledge to handle difficult cases in accordance with the applicable law. However, had knowledge transfer been prioritized from the outset, international prosecutors could have played a more proactive and significant role in helping national colleagues to overcome the inherent challenges of investigating and prosecuting complex atrocity cases.

Simply placing international and national prosecutors in the same office is not enough to achieve meaningful and regular knowledge transfer and communication. Unlike the judicial panels, which by their very nature require effective collaboration among judges to manage a trial and reach a verdict, prosecutors generally work alone in managing their respective caseloads, particularly when it comes to simpler cases. Given the sheer volume of cases that SDWC must process, it is not realistic to expect international and national prosecutors to work together on every case, even those on the same team. Indeed, it is clear that there is little communication within most teams.⁴⁷ In addition to the absence of any strategy to promote sharing of information within prosecution teams, office-wide meetings are held rarely and do not address substantive issues in detail.⁴⁸

Several of those interviewed for this report suggested ways to promote more information and knowledge sharing between international and national staff in other country situations. One suggestion was a more strategic assignment of national legal officers.⁴⁹ For the most

⁴⁵ Human Rights Watch interview with two SDWC staff, Sarajevo, June 20 and 22, 2011; Human Rights Watch interview with diplomat, Sarajevo, June 23, 2011.

⁴⁶ Human Rights Watch interview with two Special Department for War Crimes (SDWC) staff, June 20 and 22, 2011; ICLS Report, para. 105. Some cases have also fostered regular and ongoing collaboration by their nature and level of complexity, such as the 11-defendant *Kravica* case. The *Kravica* case involved allegations of genocide stemming from the Srebrenica massacre. See Human Rights Watch, *Narrowing the Impunity Gap*, p. 6.

⁴⁷ Email communication from SDWC staff to Human Rights Watch, August 23, 2011.

⁴⁸ Human Rights Watch interview with two SDWC staff, Sarajevo, June 20 and 22, 2011.

⁴⁹ Human Rights Watch telephone interview with OSCE staff, Sarajevo, June 17, 2011; Human Rights Watch interview with three SDWC staff, Sarajevo, June 20 and 22, 2011.

part in the SDWC, international legal officers work with international prosecutors while national legal officers work with national prosecutors. However, this separation overlooks the potentially invaluable role of national legal officers in the process of knowledge transfer.⁵⁰ For instance, national legal officers can be a key resource for international prosecutors because of their knowledge of national criminal law and procedure, their understanding of the cultural context, and their familiarity with the history of the war.⁵¹ Those who are fluent in Bosnian/Croatian/Serbian and English can operate more efficiently and expedite investigations, and can also help promote more exchange of information and knowledge within the same team.

Further, it is worth noting that assigning national legal officers to international prosecutors can help young, talented lawyers hone their skills and further their professional development on the national level. One international prosecutor pointed to the fact that two of his national legal officers went on to become prosecutors in the district and cantonal courts.⁵²

The SDWC could also achieve more effective transfer of knowledge by holding weekly office-wide meetings among all staff to discuss important factual and legal issues that arise in the course of prosecuting cases. Creating a regular forum to promote the exchange of information and best practices would help ensure that national and international prosecutors put forward a consistent and coherent approach in court.⁵³ Such consistency is particularly important in atrocity crime cases where, because the jurisprudence on many issues is unsettled (for instance, with respect to the elements of a joint criminal enterprise), there is significant potential for prosecutors to adopt potentially conflicting approaches on the same legal issue in different cases. The same is true when it comes to making submissions on sentencing. In addition to promoting knowledge transfer, holding regular meetings could go a long way to foster a sense of collegiality among staff and strengthen the office overall.

The experience in Bosnia has underscored the importance of including knowledge transfer in the job description of international and national prosecutors. Further, creating formal

⁵⁰ International legal officers with experience in international humanitarian and criminal law can also play a role, through providing indispensable research assistance to national and international prosecutors.

⁵¹ Human Rights Watch interview with SDWC staff, Sarajevo, June 20, 2011.

⁵² Email communication from SDWC staff to Human Rights Watch, August 23, 2011.

⁵³ Human Rights Watch interview with SDWC staff, Sarajevo, June 22, 2011.

incentives for international and national prosecutors to transfer their expertise and learn from each other helps to create an environment in which sharing information and skills becomes the norm.⁵⁴ For instance, the head prosecutor should regularly evaluate international prosecutors based on their efforts to transfer their knowledge of international humanitarian law, adversarial techniques, and management practices, as well as the extent to which they have mastered national law.⁵⁵ The head prosecutor should likewise evaluate national prosecutors based on review of their efforts to share expertise on national law and their progress in absorbing and applying the skills learned from international prosecutors. An important measure of how much knowledge transfer has been achieved should be the extent to which national prosecutors handle complex cases.⁵⁶

Evaluating both international and national prosecutors would help to underline that the transfer of skills is a two-way street. It could also help create a level playing field for both international and national prosecutors when it comes to sharing expertise, and provide both with the motivation to work together. Both national and international prosecutors would benefit from training on how to share their respective skill sets.⁵⁷ Of course it is also important for the head prosecutor conducting evaluations to ensure that both international and national staff are given the time to share knowledge and information effectively.

Finally, as discussed earlier with respect to judges, the head prosecutor should regulate the training offered by donors and nongovernmental organizations to ensure that offers of donor support match identified needs. Coordination is essential to avoid wasting valuable staff time and the donor money.

⁵⁴ Human Rights Watch interview with SDWC staff, Sarajevo, June 22, 2011.

⁵⁵ ICLS report, para. 110.

⁵⁶ ICLS report, para. 110.

⁵⁷ ICLS report, para. 110.

III. Institution Building

The challenges facing states emerging from conflict in creating healthy judicial institutions are immense. They include: putting in place the necessary legal basis, building the physical structure, hiring and training staff, establishing an effective system of witness protection, and creating standards to encourage consistency and professionalism, to name but a few. It is against this backdrop that the accomplishments of the Bosnian War Crimes Chamber should be measured. That the chamber has concluded proceedings in over 200 cases involving atrocity crimes in the seven years since it has been operating is a testament to what can be achieved when concerted efforts are directed at institution building.

International staff members have undoubtedly played a prominent role in the success of the SDWC, the chamber, and its related bodies. At the same time, when measured against the objective of institution building—that is, the aim to create a sustainable infrastructure in the chamber and the SDWC that promotes the delivery of fair, effective, and independent justice—the record is mixed. Closer examination of experiences in the judiciary, in the SDWC, and in the implementation of witness protection can yield valuable lessons for those seeking to make the most of the contribution of international staff in other contexts. These areas are discussed in more detail below.

1. The Bench

Recruiting the right candidates is key to realizing the full potential of the contribution of international judges to building a strong judiciary.⁵⁸ It is essential that those responsible for recruitment of judges should select candidates who not only have the requisite legal knowledge and courtroom expertise, but also demonstrate commitment and experience in institution building.⁵⁹ Selection panels should look for judges familiar with the ins and outs of a functioning judicial system, and who have experience teaching other judges.⁶⁰ Judges should also be selected on the basis of their familiarity with the administration of

⁵⁸ Tenure is another relevant factor in recruiting candidates; experience in Bosnia has shown that those who stay longer (i.e. at least 2 years) can have a more substantial impact.

⁵⁹ Human Rights Watch interviews with two court staff, Sarajevo, June 20 and 22, 2011; Human Rights Watch interview with HJPC staff, Sarajevo, June 24, 2011.

⁶⁰ Human Rights Watch interview with court staff, Sarajevo, June 20, 2011.

justice—that is, the nuts and bolts of a functioning court, and how to make the framework stronger—and the adjudication of justice.⁶¹

There are a number of positive examples of initiatives undertaken by individual international judges outside of the courtroom aimed at strengthening the judiciary in Bosnia. The Judicial College was created on the initiative of one international judge and has developed into a valuable forum for knowledge sharing among judges. Another international judge spearheaded the formation of an ad hoc working group on witness protection to address issues relating to the court’s use of protective measures.⁶² There have also been efforts to capture best practices on paper—for instance, a manual on video link protocols to educate new judges and judges in the entity courts and a style guide to bring uniformity and clarity to decisions.⁶³

However, these laudable initiatives have been the result of the work of a few individual judges and do not really reflect a formal, systematic commitment to strengthening the institution outside of the courtroom. The international community and the Bosnian authorities should have identified institution building as a priority from the outset. Further, they should have given priority to hiring international judges with experience in building institutions.⁶⁴ In other contexts, it is important for the international community and national authorities (for instance through the Registry) to clearly articulate what is expected of international judges when it comes to strengthening the institution. Judges should be expected to use their working hours outside of the courtroom to build the institution.⁶⁵ This could include, for instance, identifying problems that emerge while adjudicating cases and taking steps in collaboration with national judges to solve those problems (for example by developing user-friendly manuals for all judges, organizing working groups to address sticky legal issues, etc.).

⁶¹ Email communication from court staff to Human Rights Watch, September 7, 2011.

⁶² Human Rights Watch, *Narrowing the Impunity Gap*, p. 30.

⁶³ Email communication from court staff to Human Rights Watch, September 7, 2011; Human Rights Watch Interview with court staff, Sarajevo, June 20, 2011.

⁶⁴ Human Rights Watch Interview with HJPC staff, June 24, 2011. It is worth noting that such experience does not appear to have been formally prioritized in past vacancy searches. See, for example, Registry, Court of Bosnia and Herzegovina, “Public Announcement for Vacancies: International Judge of the Court of Bosnia and Herzegovina, undated, <http://www.registrarbih.gov.ba/index.php?opcija=posao&id=52&jezik=e> (accessed February 7, 2012).

⁶⁵ Email communication from court staff to Human Rights Watch, September 17, 2011.

Finally, in other contexts, the body responsible for deploying international judges (such as a Registry) should do so based on an assessment of actual need. In Bosnia, several sources pointed out that there were simply too many international judges at the beginning given that no cases were being adjudicated at such an early stage in the court's life.⁶⁶ This wasted precious donor resources. Only a few judges were likely to be needed in the early pretrial stage to handle preliminary motions.⁶⁷ When not in session, those judges could have begun valuable institution building work such as developing a list of goals to be accomplished before the start of trials and a timeline for their completion.⁶⁸

Overall, in any context, international judges should avoid trying to simply replicate their own national systems or the practices of international tribunals. While these systems may provide helpful insights, international judges should approach their role with an understanding of how the existing national judicial system works and be dedicated to preserving and enhancing functional parts of the system.⁶⁹ This is important as an expression of respect for the national system and the experience of national colleagues. It can also help avoid inefficiencies.

2. Special Department for War Crimes

The OHR initially appointed international prosecutors into the Special Department for War Crimes (SDWC) to handle cases transferred by the ICTY under its completion strategy. This role expanded to include other complex and politically sensitive cases. To be sure, many international prosecutors have worked hard to do precisely that. However, with the benefit of hindsight, it is clear that the Special Department for War Crimes—a new office with no institutional history or practice to draw from—should have also, from the outset, made it a priority to use international assistance to create an institutional and administrative legacy by way of a strong and functional office to manage the day-to-day challenges of prosecuting cases.⁷⁰ Indeed, it takes time and effort to build an office that supports thorough investigations and effective prosecutions and an institutional culture that promotes transparency and collaboration among peers. Policymakers, donors, and the

⁶⁶ Human Rights Watch interviews with three court staff, Sarajevo, June 20, 21, and 22, 2011.

⁶⁷ Email communication from court staff to Human Rights Watch, October 18, 2011.

⁶⁸ Email communication from court staff to Human Rights Watch, October 18, 2011.

⁶⁹ Email communication from court staff to Human Rights Watch, October 18, 2011.

⁷⁰ Human Rights Watch interview with two SDWC staff, Sarajevo, June 20 and 22, 2011; Human Rights Watch interview with diplomat, Sarajevo, June 23, 2011; Human Rights Watch interview with HJPC, Sarajevo, June 24, 2011.

Bosnian authorities should have identified this as a priority for international staff in their job descriptions from the beginning.

The situation changed somewhat in late 2007 with the appointment of an international prosecutor to head the Special Department for War Crimes. Following the appointment, the international head prosecutor made efforts to identify weaknesses in the office, standardize practice, and unify prosecutorial policy. Unfortunately, these efforts proved to be insufficient, in part because they came too late to take root and thrive.⁷¹ The result is an office weakened by lack of communication among staff, inefficiencies in processing routine administrative matters, and inconsistencies in the implementation of key prosecutorial policies, including in relation to case selection.⁷²

In the future, policymakers, national authorities, and donors should give serious consideration to appointing at an early stage an international prosecutor with experience in running a prosecutor's office handling serious crimes to head the prosecutor's office for a limited period of time. Instead of prosecuting cases, the international head prosecutor should focus on developing the office as a strong, independent, and functional institution. Based on a needs assessment, the international head prosecutor should work with national staff to develop policies and procedures to deal with substantive issues that routinely emerge when handling atrocity cases: for example, handling insider and traumatized witnesses, witness protection during investigations, and standards for applying plea agreements (if permitted under domestic law). Other important areas could include designing and implementing a working system for assigning all cases,⁷³ a standard template for drafting indictments, and a procedure for reviewing indictments to ensure conformity with established policies.⁷⁴ Further, the international head prosecutor could play an important role in liaising with the donor community to ensure that the trainings offered correspond with actual needs and maintain a practical focus in their delivery.⁷⁵

⁷¹ ICLS report, para. 48; Toby M. Cadman, "Bosnian Blog Part 1: International Assistance," post to "International Criminal Law Bureau" (blog), September 1, 2009, <http://www.internationalallawbureau.com/blog/?p=573> (accessed February 7, 2012).

⁷² *Balkan Investigative Reporting Network*, "Bosnia State Prosecutor 'Slowing' Work on War Crimes," May 13, 2011, <http://www.bim.ba/en/269/10/32429/> (accessed February 16, 2012).

⁷³ Such a system should take into account how to ensure the even distribution of complex cases among national and international prosecutors over time.

⁷⁴ Currently, all indictments are reviewed by the head of the SDWC. Human Rights Watch interview with SDWC staff, Sarajevo, June 20, 2011.

⁷⁵ The need to better coordinate trainings to ensure they are targeted to address actual need has been noted as a problem in the SDWC. See David Schwendiman, *Capacity Building*, p. 211.

In addition to developing procedures to help manage cases, the international head prosecutor should also consider what administrative procedures are needed to manage the routine administrative chores of the office. For instance, developing procedures for signing off on procurement requests, processing mutual legal assistance requests, and reviewing requests for case-related costs (such as travel of investigators and witness expenses) could go a long way to helping an office run more smoothly.

In 2006 a separate Registry was created within the Prosecutor's Office to manage many of these administrative issues.⁷⁶ However, within the SWDC, the lack of clear dividing lines of authority on routine matters between the registrar and the then-chief prosecutor, both national staff members, proved to be highly problematic. This lack of clarity has led to confusion among staff about who is the ultimate decision-making authority on a number of administrative issues. It has also resulted in inefficiencies in the office and continues to undermine internal office cohesion.⁷⁷

In order to build a well-functioning prosecutor's office, the international head prosecutor should not only establish procedures in substantive and administrative areas, but also create clear lines of authority for decision-making.⁷⁸ To promote the smooth running of the office and the timely processing of routine requests, the international head prosecutor should further strengthen consistency and predictability in decision-making. For instance, overcoming delays or other complications in obtaining travel authorization for an investigator to interview a witness would have a positive impact on case preparation. Creating policies and procedures to standardize practice and encourage consistency in handling routine matters (thus eliminating uncertainty and potentially power struggles over how things should be done) can also help improve communication within the office, a key precondition for effective knowledge and skill transfer.⁷⁹

⁷⁶ Decision on Ratification of the Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and for the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina as well as on the Creation of the Transition Council, Replacing the Registry Agreement of 1 December 2004 and the Annex Thereto, *Official Gazette of Bosnia and Herzegovina*, International Agreements 3/07, April 11, 2007, http://www.registrarbih.gov.ba/files/docs/New_Registry_Agreement_-_eng.pdf (accessed February 8, 2012) ("Second Registry Agreement").

⁷⁷ Human Rights Watch Interview with three SDWC staff, Sarajevo, June 20 and 22, 2011. See also ICLS report, para. 43.

⁷⁸ Email communication from SDWC staff to Human Rights Watch, January 27, 2012.

⁷⁹ Email communication from SDWC staff to Human Rights Watch, January 27, 2012.

Should the national authorities in another context agree to appoint an international head prosecutor, careful management of this appointment is essential to avoid undercutting national ownership. The national authorities should specify the length and terms of the international head prosecutor's tenure at the outset; one possibility could be to clearly link the position to the fulfillment of certain benchmarks in national legislation which would then trigger a shift to a national head prosecutor. Simultaneously appointing a national deputy who can assume leadership of the office once the international head prosecutor's tenure expires might help facilitate a seamless transition. The national authorities must be willing to enforce such a provision from the outset. In Bosnia, the legislative basis to make an international prosecutor the head of the SDWC has been on the books since 2004, but the HJPC only appointed an international prosecutor in late 2007, more than halfway into the original five year mandate of international prosecutors.⁸⁰

The precise details of how and when the international head prosecutor may exercise his or her authority depend on the context, and should include some form of compulsory consultation with national staff, particularly in sensitive areas relating to substantive prosecutorial policy. Indeed, while giving the international head prosecutor binding authority can be very important, he or she should exercise that authority with care and consideration for national sensitivities. Decisions made in the name of expediency can foster resentment among national staff and complicate or even undermine their implementation.

One key substantive area that demands, from the outset, both leadership and buy-in by international and national staff alike is the development and implementation of a sound prosecutorial strategy for the prioritization of cases. In the early years in Bosnia, there were guidelines available to distinguish between "highly sensitive" cases, including those against senior officials, to be handled by the SDWC, and "sensitive" cases to be processed before the entity courts. However, these guidelines were still unclear, and in any event were not applied consistently or predictably. This led to public perceptions that the office was not pursuing those responsible for the most serious crimes. It also left the office

⁸⁰ See Law on Amendments to the Law on Prosecutor's Office of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, No. 3/03, January 24, 2003, http://www.tuzilastvobih.gov.ba/files/docs/zakoni/izmjene_zakona_o_tuzilastvu_-_3_03_-_eng.pdf (accessed February 8, 2012), art. 4 (inserting a new article 18a into the Law on the Prosecutor's Office of Bosnia and Herzegovina that provides for international prosecutors); see also, Law on the Prosecutor's Office of Bosnia and Herzegovina, art. 18a. David Schwendiman, *Capacity Building*, p. 194.

vulnerable to pressure from civil society and victims' groups to select cases without careful consideration as to how such demands fit within the office's overall mandate. Such an ad hoc approach inevitably disappointed public expectations and undermined the office's standing in the eyes of the citizenry.⁸¹

The Bosnia experience underscores the importance of establishing a system for case *allocation* with other courts that have overlapping jurisdiction—in Bosnia, this was the “sensitive” versus “highly sensitive” criteria. It also underscores the importance of developing criteria for the *prioritization* of cases within the prosecutor's office at a very early stage.⁸² The international head prosecutor made real progress in developing criteria to more effectively prioritize cases, but these guidelines were only finalized in 2009.⁸³ Unfortunately, concerns that the office would not implement these guidelines after his departure proved to be well-founded.⁸⁴

Lack of implementation notwithstanding, the approach that prosecutors developed in Bosnia would be helpful to consider in other contexts. The criteria reflect what is called the Situation-Event-Act-Actor or SEAA approach. This approach encourages prosecutors to look broadly at situations that occurred during the Bosnian war and then examine more narrowly events that took place within a situation to identify criminal acts and actors. It was designed to help prosecutors better understand the nature and scope of the conflict and make more informed selections of matters to investigate and possibly prosecute.⁸⁵

A related lesson from Bosnia is that it is important for prosecutors and investigators to map out the conflict early on in order to gain a sense of what kinds of crimes occurred, when and where, who the victims were, and the likely identity of perpetrators. This

⁸¹ See Human Rights Watch, *Narrowing the Impunity Gap*, pp. 8-13.

⁸² Human Rights Watch Interview with OSCE staff, Sarajevo, June 23, 2011.

⁸³ Draft Prosecution Guidelines on Prioritization (Practice Directions), Special Department for War Crimes, Court of Bosnia and Herzegovina, unpublished document on file with Human Rights Watch, February 9, 2009 (“Draft Prosecution Guidelines on Prioritization”). The guidelines underline mass murder and programmatic violence as the basic criteria for selecting and prioritizing where the SDWC's limited resources should be directed. Email communication from former SDWC staff to Human Rights Watch, February 4, 2012.

⁸⁴ ICLS report, para 149; Human Rights Watch interview with SDWC staff, Sarajevo, June 20, 2011. One source noted that a reason why the guidelines have not been implemented may be because they were not adopted as a formal policy under the established procedure in Bosnia. Email communication from SDWC staff to Human Rights Watch, February 14, 2012.

⁸⁵ See Draft Prosecution Guidelines on Prioritization; David Schwendiman, “Prosecuting Atrocity Crimes in National Courts: Looking Back on 2009 in Bosnia and Herzegovina,” *Northwestern Journal of International Human Rights*, Vol. 8, Issue 3 (Summer 2010), p. 292 (“Prosecuting Atrocity Crimes in National Courts”).

preliminary overview can help lay the groundwork on the basis of which prosecutors develop initial hypotheses of investigation. It can give a sense of the scale of violations, revealing patterns and identifying potential leads or sources of evidence.⁸⁶ In addition to helping form objective criteria to prioritize cases, understanding the patterns of abuse can also help in more effectively allocating resources earmarked for prosecutions.⁸⁷

In situations where an international tribunal is conducting investigations, the international tribunal may have already done some—but not all—of this valuable work. While these investigations may be helpful, they may not be as comprehensive as those needed for wider-scale accountability efforts at the national level. Confidential and non-confidential evidence derived from the ICTY's investigations made available to the SDWC played a key role in mapping out the crimes in Bosnia, particularly in the early days of the office's work. This was less true as time wore on, as more and more independent witnesses and facts were uncovered by Sarajevo-based SDWC staff, both national and international.⁸⁸ A more comprehensive mapping exercise was completed in 2008, which made it possible for the international head prosecutor and others in the office to finalize the SEAA approach described above.⁸⁹ An important lesson from this is that, in future efforts to provide international support to national courts to prosecute war crimes, prosecutor's offices should conduct such mapping exercises at an early stage. This would help better position them to develop case selection strategies and allocate resources more effectively.

Once workable criteria for case selection and prioritization have been established, the prosecutor's office should share them with the public as soon as possible. As mentioned above, the SDWC's inconsistent approach when it came to selecting cases, especially in the early phase, took a toll on the office's legitimacy in the eyes of the public. Developing

⁸⁶ Office of the United Nations High Commissioner for Human Rights, "Rule-of-Law Tools for Post-Conflict States: Prosecution initiatives," HR/PUB/06/04, April 2006, <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> (accessed February 15, 2012), p. 6.

⁸⁷ *Ibid.*, p. 7. As a practical matter, mapping out the most notorious incidents and sharing these findings with the public can provide the office with a degree of flexibility in implementing its prosecutorial strategy in the early days. That is, when it comes to satisfying public expectations, prosecutors may have more breathing space to pursue lower-level perpetrators involved in the most notorious incidents. Pursuing lower-ranking suspects can be essential to build cases against higher level defendants, and can also help build up the strength and credibility of the system so it can better withstand the "heavy stressors" of organized, large-scale political obstruction that can emerge when senior officials are pursued. Email communication from SDWC staff to Human Rights Watch, September 3, 2011.

⁸⁸ Email communication from SDWC staff to Human Rights Watch, January 25, 2012; email communication from former SDWC staff to Human Rights Watch, February 4, 2012.

⁸⁹ David Schwendiman, *Prosecuting Atrocity Crimes in National Courts*, p. 292.

criteria to prioritize cases early on, together with efforts to make those criteria public and their consistent implementation, can go a long way to help manage expectations of what the prosecutor's office can achieve. Managing expectations helps lay the groundwork for long-term public support of the office's work and for a political climate which favors accountability over impunity for atrocity crimes.

Beyond policies that encourage transparency and efficiency of decision-making, a marker of a functional prosecutor's office is how well it is organized to perform the various functions described above. The establishment of at least three key units has been identified as promoting efficiency in processing atrocity crimes: a research and analysis section, a data management section, and an administrative section.⁹⁰ A research and analysis section that includes criminal intelligence analysts, military experts, and historians can be essential.⁹¹ These experts can help contextualize all available evidence into a comprehensive analysis that can help guide and focus further investigations. The expertise and analysis of the section can also help judges to not lose sight of the bigger picture at trials.⁹²

A data management section can centralize and make accessible the thousands of pages of documentary evidence common in complex crimes, and can develop procedures to collect and preserve physical and forensic evidence (human remains and the record of exhumation) in a controlled location, among other key functions. This should include establishing an electronic database early on, which is accessible to prosecutors in all national courts handling atrocity cases. Finally, an administrative section under the clear direction of the head prosecutor could manage the routine tasks discussed above (such as processing procurement requests, handling recruitment for national staff, and reimbursing routine travel expenses) in addition to helping the head prosecutor manage donor funds.

3. Witness Protection

Adequately protecting witnesses inside and outside of the courtroom is crucial to prosecutions and fair trials of atrocity crimes. Particularly in relation to in-court measures, there has been considerable progress since the chamber began operations, and the

⁹⁰ Email communication from SDWC staff to Human Rights Watch, August 23, 2011; Human Rights Watch interview with former SDWC staff, New York, July 19, 2011.

⁹¹ Email communication from SDWC staff to Human Rights Watch, August 23, 2011.

⁹² Email communication from SDWC staff to Human Rights Watch, August 23, 2011.

judges have demonstrated a serious commitment to the protection of witnesses.⁹³ As mentioned above, one international judge formed an ad hoc working group on witness protection to improve judicial practice around the use of protective measures. Further, in 2008 the court's judges developed rules of procedure on the implementation of witness protection measures under the law applicable before the State Court.⁹⁴

The Bosnian authorities have made less progress when it comes to the more difficult modalities involved in protecting witnesses outside of the courtroom. There is essentially no follow up for witnesses after they testify, and witnesses have recanted their testimony in some cases because of threats.⁹⁵

Out-of-court witness protection in proceedings before the State Court falls under the purview of the Witness Protection Unit (WPU) of the Bosnian State Investigation and Protection Agency (SIPA). Due to resource and capacity constraints early on, the court's Registry entered into an agreement with SIPA to provide resources and technical support to SIPA's WPU for a limited period of time. Included in the support offered by the Registry was the assistance of an international witness protection advisor seconded by a donor government.⁹⁶ In a country with no witness protection practice to draw on, such support could have been instrumental in building a functioning program.⁹⁷ However, SIPA WPU staff and others felt that the international advisor focused on providing routine trainings rather than offering hands-on assistance when it came to establishing protocols and operating procedures to support a functioning witness protection agency.⁹⁸

The experience in Bosnia further highlights that it is important for national authorities to develop a sound and comprehensive legal basis to protect witnesses from the outset. According to one source interviewed, the applicable Witness Protection Program Law in

⁹³ Human Rights Watch, *Looking for Justice*; Human Rights Watch, *Narrowing the Impunity Gap*; OSCE, "Witness Protection and Support in BiH Domestic War Crimes Trials: obstacles and recommendations a year after adoption of the national strategy for War Crimes Processing," January 2010, http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf (accessed February 15, 2012) ("OSCE 2010 Report").

⁹⁴ OSCE 2010 Report, p. 17.

⁹⁵ Email communication from SDWC staff to Human Rights Watch, February 1, 2012.

⁹⁶ Human Rights Watch, *Looking for Justice*, p. 29. See also Letter from Michael Th. Johnson, Registrar for War Crimes and Organized Crimes, Court of Bosnia and Herzegovina, June 8, 2005, http://www.registrarbih.gov.ba/files/docs/June_Progress_Report_June_2005.pdf (accessed February 7, 2012).

⁹⁷ Human Rights Watch interview with the Bosnian State Investigation and Protection Agency (SIPA), Sarajevo, June 23, 2011.

⁹⁸ Human Rights Watch interview with SIPA staff, Sarajevo, September 29, 2006; Human Rights Watch interview with former SDWC staff, New York, January 9, 2012.

Bosnia, which specifies how the SIPA WPU applies its protection mandate outside of the courtroom, is inadequate.⁹⁹ For instance, the law fails to specify the procedure by which a witness should be included into the witness protection program. It only states that the Witness Protection Unit within SIPA takes all decisions “independently after careful assessment of the circumstances.”¹⁰⁰

Further, the law fails to articulate the WPU’s operational autonomy within SIPA, which has an impact on its ability to provide effective protection. For witness protection to function properly, separation from the investigation, confidentiality of procedure and operations, and organizational autonomy from regular police are all essential.¹⁰¹ All three factors are aimed at safeguarding sensitive information relating to protected witnesses by limiting the number of people in possession of such information. This minimizes the risk of disclosure. Because the WPU lacks operational autonomy, it must obtain permission from a number of outside sources, including court officials and the director of SIPA, before it can take certain decisions related to witness protection.¹⁰² As a result, the number of those with knowledge of sensitive information increases, which in turn increases the risk of witness exposure.¹⁰³

One of the reasons cited for the law’s deficiencies is the fact that it was drafted by international lawyers rather than international practitioners in the field of witness protection.¹⁰⁴ The law’s weaknesses, together with chronic resource and personnel shortages, have rendered the witness protection program in Bosnia inoperative.¹⁰⁵

Since 2008—more than three years after the chamber started operations—international and national experts have been making serious efforts to improve witness protection

⁹⁹ ICLS report, para. 51; Human Rights Watch interview with WINPRO staff, Sarajevo, June 24, 2011.

¹⁰⁰ Witness Protection Program Law, *Official Gazette of Bosnia and Herzegovina*, No. 29/04, 2004, art. 3(1).

¹⁰¹ See United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (Vienna: United Nations Office on Drugs and Crime, 2008), <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Febo8.pdf> (accessed February 8, 2012), p. 46.

¹⁰² Human Rights Watch interview with WINPRO staff, Sarajevo, June 24, 2011. For instance, because it lacks control over its operational funds, the Witness Protection Unit must get approval from an administrative court employee to stay with a witness in a hotel. The court employee must then make the reservations. As a result, the confidentiality of the operation is compromised. Email communication from ICITAP staff to Human Rights Watch, January 25, 2012.

¹⁰³ Human Rights Watch interview with WINPRO staff, Sarajevo, June 24, 2011.

¹⁰⁴ Human Rights Watch interview with WINPRO staff, Sarajevo, June 24, 2011; Human Rights Watch interview with former SDWC staff, New York, January 9, 2012.

¹⁰⁵ Parliamentary Assembly, Council of Europe, “The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans,” Doc. 12440 rev, January 12, 2011, <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12440.pdf> (accessed February 8, 2012), paras. 40, 44 (“Council of Europe Witness Protection report”).

outside of the courtroom.¹⁰⁶ Included among these efforts is an initiative to revise the current Witness Protection Program Law in a way that would better support a functional witness protection program. Unfortunately, a draft law aimed at addressing many of the current law's deficiencies was defeated in Bosnia's parliament in July 2008.¹⁰⁷

Nonetheless, efforts to revise the law persisted, and in August 2011 the Bosnian Ministry of Security formed a working group to put forward another draft law.¹⁰⁸ Like its predecessor, the 2011 Draft Witness Protection Program Law outlines the procedure for witnesses to enter the protection program, the types of protection measures available, and the circumstances under which protection could be terminated.¹⁰⁹ It also specifies the Witness Protection Unit's operational authority over witness protection matters within SIPA and its separate financing under SIPA's budget.¹¹⁰ At this writing, however, the 2011 draft of the revised law has not been passed.

¹⁰⁶ International efforts include the European Commission-funded Witness Protection in the Fight against Serious Crime and Terrorism Project (WINPRO), which is tasked with setting up the biggest witness protection program in Europe covering seven countries: Croatia, Serbia, Bosnia, Kosovo, Montenegro, Macedonia, and Albania. See European Commission, "Project Fiche: No. 1: Cooperation in Criminal Justice: Witness Protection in the Fight against Serious Crime and Terrorism (WINPRO)," CRIS No. 2009/021-373, 2009, http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2009/political/pf.o1_winpro_en.pdf (accessed February 8, 2012). Similarly, the US-funded International Criminal Investigative Training Assistance Program (ICITAP) is providing important assistance in the areas of witness protection and judicial security. More broadly, the goal is to develop professional and transparent law enforcement institutions that protect human rights, combat corruption, and reduce the threat of transnational crime and terrorism (see <http://www.justice.gov/criminal/icitap/about/>).

¹⁰⁷ Commentators have suggested that the law was defeated because it would have given SIPA's WPU jurisdiction to provide witness protection to entity courts. See Council of Europe Witness Protection report, para. 62.

¹⁰⁸ See Amnesty International, "Bosnia and Herzegovina: Follow Up Procedure to the Forty-Fifth Session of the Committee Against Torture," November 2011, http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_BiH_followup.pdf (accessed February 8, 2012).

¹⁰⁹ Proposed Amendments Act, Witness Protection Program, unpublished document on file with Human Rights Watch, October 14, 2011, arts. 8, 10, and 18 ("2011 Draft Witness Protection Program Law").

¹¹⁰ 2011 Draft Witness Protection Program Law, art. 25(1).

IV. Transition Strategy

The domestic legislation which permitted the inclusion of international judges and prosecutors in trying atrocity cases established a five-year deadline for their departure, but contained little guidance on how this deadline should be met in practice. The issue was addressed in a 2006 agreement between the high representative and the Bosnian presidency on the transition from international to qualified national staff and the gradual assumption of financial support of the State Court and the Prosecutor's Office by the Bosnian authorities.¹¹¹

The agreement established the Transition Council, an advisory body mandated to coordinate the transition of the registries of the State Court and the Prosecutor's Office into national institutions. It is composed of the registrars of the Bosnian State Court and the Prosecutor's Office, the president of the court, the chief prosecutor, the head of the High Judicial and Prosecutorial Council, and Bosnia state ministers of justice, European integration, and finance. International observers, acting as representatives of donors, attend the council's meetings and inform the donor community of the council's decisions. The Transition Council has at least four meetings per year.¹¹²

Developing and implementing an exit strategy for international staff is an important feature of the Bosnian model of internationalized justice. Specifying from the outset a concrete deadline—in this case, five years—for the phasing out of international judges and prosecutors and establishing the legal framework to do so responsibly while maintaining national ownership is essential.

At the same time, the Bosnia example highlights the dangers of using a preset deadline to phase out international staff. Beginning in 2008, there was growing and widespread

¹¹¹ Second Registry Agreement. The agreement replaces the 2004 agreement signed by the high representative and the Bosnian presidency which created an independent registry. The 2004 agreement notably recognized the importance of transitioning positions to national staff but did not provide the legal structure to do so. See Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, December 1, 2004, http://www.registrarbih.gov.ba/files/docs/Old_Registry_Agreement_-_eng.pdf (accessed February 8, 2012).

¹¹² Human Rights Watch interview with court staff, Sarajevo, June 21, 2011.

recognition—both domestically and internationally—that phasing out international judges and prosecutors by the end of 2009 would have a negative impact on the processing of atrocity cases.¹¹³ Nonetheless, when the time came in the Bosnian parliament to extend the mandates of international judges and prosecutors, opposition by representatives of political parties based in Republika Srpska resulted in the failure to adopt the necessary amendments.¹¹⁴ Further, the Bosnian authorities had failed to provide the chamber and Prosecutor’s Office with the resources needed to ensure the recruitment of national judges and prosecutors to gradually replace international judges and prosecutors whose mandates were due to expire.¹¹⁵

At the last minute—indeed, on the date their mandates were set to expire—the high representative stepped in and, using his Bonn powers,¹¹⁶ extended the transitional period for international judges and prosecutors handling atrocity cases until the end of 2012.¹¹⁷ Unfortunately, by that time, all but one of the international prosecutors had left the Special Department for War Crimes. They took with them valuable institutional and case knowledge. Precious time of the hard-won three year extension was lost recruiting new international prosecutors, who then had to familiarize themselves with case files and the workings of the office.

¹¹³ Letters and/or statements supporting the extension of the presence of international judges and prosecutors beyond December 2009 were sent by a number of national and international stakeholders including: the president of the Court of Bosnia and Herzegovina and the chief prosecutor of Bosnia and Herzegovina (May and September 2008 and March 2009); the Transition Council, the Council of Ministers, and the HJPC (October 2008); the president of the ICTY (October 2009 and June 2009); and the prosecutor of the ICTY (June 2009 and December 2009). See Valentin Inzko, High Representative for Bosnia and Herzegovina, “Decision Enacting the Law on Amendment to the Law on Court of Bosnia and Herzegovina,” December 12, 2009, http://www.ohr.int/decisions/judicialdec/default.asp?content_id=44283 (accessed February 8, 2012) (“HR decision extending international judges”); High Representative for Bosnia and Herzegovina, “Decision Enacting the Law on Amendments to the Law on Prosecutor’s Office of Bosnia and Herzegovina,” December 14, 2009, http://www.ohr.int/decisions/judicialdec/default.asp?content_id=44287 (accessed February 8, 2012) (“HR decision extending international prosecutors”). Human Rights Watch also expressed support for the extension of international judges and prosecutors handling war crimes cases. See Letter from Human Rights Watch to the High Representative for Bosnia and Herzegovina, December 7, 2009, <http://www.hrw.org/news/2009/12/07/letter-high-representative-bosnia-and-herzegovina>.

¹¹⁴ “OHR Extends International Judges’ Mandate,” *Balkan Insight*, December 16, 2009, <http://www.balkaninsight.com/en/article/ohr-extends-international-judges-mandate> (accessed February 8, 2012).

¹¹⁵ HR decision extending international judges; HR decision extending international prosecutors.

¹¹⁶ At its December 1997 meeting in Bonn, the Peace Implementation Council, an international body tasked with implementing the Dayton Peace Agreement for Bosnia and Herzegovina, granted substantial powers to the high representative to enact laws as needed to implement the Dayton Agreement and remove elected officials considered to be obstructing its implementation.

¹¹⁷ Law on Amendment to the Law on Court of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, No. 97/09, December 14, 2009, art. 1(1); Law on Amendments to the Law on the Prosecutor’s Office of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, No. 97/09, December 12, 2009, art. 3(3).

As evidenced by the extension, five years was simply not enough time—at least in the Bosnian context—to build an institution, establish the framework and best practices to keep it running efficiently, and process cases, many of which are complex, sensitive, and can involve multiple accused. An investigation alone in a complex case can take several years. When the time came to extend the mandates of international staff, the political landscape had deteriorated such that drastic action was required so as not to jeopardize cases.

While devising a rigorous exit strategy for international staff is essential for national authorities to maintain ownership, this must be balanced against the need to develop an approach that supports a certain amount of flexibility in evaluating concrete progress. A better alternative could involve establishing a series of benchmarks linked to building the institution and trying cases.¹¹⁸ The achievement of these benchmarks would trigger the departure of international staff.¹¹⁹

For instance, progress could be linked to not only the number of cases that have reached a final verdict, but also their level of complexity and the official position of the defendant. Institution building benchmarks should also be incorporated into the analysis (for example, whether there is a functioning witness protection program, a prosecutorial strategy for handling cases that is being consistently implemented, and concrete efforts to standardize judicial practice in routine areas). It may also be worth assessing how conducive the political climate is to the pursuit of accountability by evaluating public statements made by politicians and media reporting of trials involving atrocity crimes.

On the fulfillment of these benchmarks, those devising the transition strategy should give the ultimate decision-making authority to an independent body that includes international donors rather than to a purely national body or institution, like parliament.¹²⁰ A body such as the Transition Council—which includes representation of national and international

¹¹⁸ Human Rights Watch interview with court staff, Sarajevo, June 21, 2011; Human Rights Watch interviews with two SDWC staff, Sarajevo, June 22, 2011; Human Rights Watch interview with HJPC staff, Sarajevo, June 22, 2011; Human Rights Watch interview with three diplomats, Sarajevo, June 22 and June 24, 2011; Human Rights Watch interview with OSCE staff, Sarajevo, June 23, 2011.

¹¹⁹ As one commentator has suggested, there may be a need to incorporate concrete incentives for the relevant actors (often financial) to achieve this progress in a timely fashion. See Alejandro Chehtman, “Developing Bosnia and Herzegovina’s Capacity to Process War Crimes Cases: Critical Notes on a ‘Success Story’,” *Journal of International Criminal Justice*, vol. 9 (2011), p. 569.

¹²⁰ Human Rights Watch interview with court staff, Sarajevo, June 20, 2011; Human Rights Watch interview with HJPC staff, Sarajevo, June 22, 2011.

stakeholders—could play a valuable role in deciding when goals have been reached. Linking the departure of international staff to established indicators of progress could go a long way to help make a nascent judicial institution less vulnerable to the volatility of the political marketplace.

V. The Political Appetite for Justice in Bosnia: The Value of Effective Outreach

Since the war in Bosnia was fought along ethnic lines, the international community considered it essential to place international judges and prosecutors in the War Crimes Chamber and the Special Department for War Crimes in order to build capacity and public confidence in both institutions' ability to render impartial justice. It also saw the value of creating an environment in which judges and prosecutors could process sensitive cases without political pressure or influence. As discussed above, to a large extent, these advantages have been borne out in practice.

However, success in prosecuting and trying cases aside, the political landscape in Bosnia has deteriorated significantly since the War Crimes Chamber and the SDWC began operations. The prosecution and trial of atrocity crimes cases have run afoul of increasingly forceful nationalist rhetoric which has its roots in longstanding ethnic tensions and is part of a broader political agenda aimed at undermining state cohesion.¹²¹ The opposition of politicians in the Republic Srpska may also be linked to efforts by the Prosecutor's Office to investigate corruption allegations.¹²² Some national politicians have targeted the court and the Prosecutor's Office in a prolonged campaign aimed at delegitimizing state institutions. The OSCE has noted that the extended campaign against the court and the Prosecutor's Office has undermined public support for war crimes trials in Bosnia, particularly among Bosnian Serbs.¹²³

¹²¹ The overarching political divisions have undercut the processing of atrocity crimes cases in a tangible way. In 2008, an effort to pass revised legislation on the Witness Protection Program, which would have effectively operationalized previously nonexistent out-of-court witness protection measures at the entity levels through the State Investigation Protection Agency, was defeated. One of the primary reasons identified was the "general feeling that this law should not be adopted at federal level [sic] as entity competencies should remain within the entities." See Council of Europe Witness Protection report, para. 62.

¹²² Prime Minister Milorad Dodik, a key instigator of attacks on state institutions including the War Crimes Chamber, was under investigation by the corruption section of the Prosecutor's Office for corruption and embezzlement. See "Republika Srpska's Dodik accused of embezzlement," Southeast European Times, February 20, 2009, http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2009/02/20/feature-01 (accessed February 8, 2012); Nidzara Ahmetasevic, "Bosnia Court: a European Entity?" *Radio Netherlands Worldwide*, May 23, 2011, <http://www.rnw.nl/international-justice/article/bosnia-court-a-european-entity> (accessed February 8, 2012). The investigation has been closed. Email communication from SDWC staff to Human Rights Watch, January 27, 2012.

¹²³ Organization for Security and Co-operation in Europe, "Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010," May 2011, http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf (accessed February 10, 2012), p.86 ("OSCE 2011 report").

Indeed, since 2008, officials in the Republic of Srpska in particular have led forceful efforts to undermine the State Court and prosecutors, alleging, among other things, that the institutions are biased because of the higher number of cases against Serbs.¹²⁴ In September 2009, attacks by politicians on the court and the Prosecutor's Office continued around the proposal to extend the mandate of international judges and prosecutors involved in atrocity cases, which was set to expire in December 2009.¹²⁵ As discussed earlier, at the end of 2009, following the decision by the Bosnian parliament not to adopt revised legislation that would have extended their mandates, the high representative reversed the decision and extended their mandates for an additional three years.

In April 2011 the Republic of Srpska's National Assembly called a referendum to be held in mid-2011 for voters to decide whether to "support laws imposed by the high representative in Bosnia, in particular the laws on Bosnia's state court and prosecution."¹²⁶ The referendum was ultimately called off in May 2011 following negotiations with the European Union's high representative for foreign affairs, Catherine Ashton.¹²⁷ The unprincipled criticisms have not ceased, however. In January 2012, Republic of Srpska Prime Minister Milorad Dodik renewed calls for the expulsion of international prosecutors from Bosnia.¹²⁸

There have been efforts by the court and especially the Prosecutor's Office to address these criticisms and defend the integrity of the institution.¹²⁹ However, such initiatives

¹²⁴ Bertelsmann Stiftung, *BTI 2010 – Bosnia and Herzegovina Country Report* (Gütersloh: Bertelsmann Stiftung, 2009), http://www.bertelsmann-transformation-index.de/fileadmin/pdf/Gutachten_BTI2010/ECSE/Bosnia_and_Herzegovina.pdf (accessed February 8, 2012).

¹²⁵ See, for example, Velma Saric, "Bosnia: Future of International Judges and Prosecutors in Doubt," Institute for War & Peace Reporting, September 16, 2009, <http://iwpr.net/report-news/bosnia-future-international-judges-and-prosecutors-doubt> (accessed February 15, 2012).

¹²⁶ See Irena Knewzevic, "Bosnian Serb Leader: War Crimes Court Should Go," *Ventura County Star* (Banja Luka, Bosnia and Herzegovina), April 13, 2011, <http://m.vcstar.com/news/2011/apr/13/bosnian-serb-leader-war-crimes-court-should-go/> (accessed February 10, 2012); "Referendum not to be on RS status," *B 92* (Belgrade, Serbia), http://www.b92.net/eng/news/region-article.php?yyyy=2011&mm=04&dd=29&nav_id=74061 (accessed February 10, 2012).

¹²⁷ "Dodik agrees to postpone RS referendum," *B 92* (Belgrade, Serbia), May 12, 2011, http://www.b92.net/eng/news/region-article.php?yyyy=2011&mm=05&dd=12&nav_id=74301 (accessed February 10, 2012); "Dodik changes mind on referendum," *B 92* (Banja Luka, Bosnia and Herzegovina), May 13, 2011, http://www.b92.net/eng/news/region-article.php?yyyy=2011&mm=05&dd=13&nav_id=74312.

¹²⁸ "First open issues, then government, RS president says," *B 92* (Banja Luka, Bosnia and Herzegovina), January 21, 2012, http://www.b92.net/eng/news/region-article.php?yyyy=2012&mm=01&dd=21&nav_id=78400 (accessed February 10, 2012).

¹²⁹ In November 2009, then-Chief Prosecutor Milorad Barasin issued an open letter in response to some of the attacks, emphasizing that the office "works on behalf of disempowered citizens, for their protection and protection of the entire state and social community from criminal offense perpetrators in the aim of fairness, protection of justice and compliance with laws passed by the Parliament and Assemblies of Bosnia and Herzegovina and its entities." See open letter from Milorad Barasin, Chief Prosecutor of the Bosnia and Herzegovina Prosecutor's Office, to H.E. Valentin Inzko, High Representative in

seem to be largely confined to reacting to negative press.¹³⁰ Overall, there is simply no comprehensive outreach strategy to engage with victims, the public, or the media.¹³¹ While the Public Information and Outreach Section (PIOS) in the Registry initially had ambitious plans to implement a comprehensive outreach plan—by cultivating a country-wide network of supportive nongovernmental organizations and encouraging them to reach out to their constituencies—this plan was effectively dismantled not long after its inception.¹³² The PIOS has made efforts to share information in certain areas.¹³³ However, it has devised no comprehensive and systematic strategy because outreach has not been prioritized by the court.¹³⁴ The information gap has resulted in victims’ groups expressing their frustration with the State Court and the SDWC.¹³⁵

As a result, a vicious cycle has emerged: the negative attacks, as part of a larger effort to undermine cohesion among Bosnia’s entities, have contributed to souring public opinion, which has in turn created more space for the negative attacks to continue. The fact that the Bosnian State Court does not have constitutional status, which would have enshrined its position in Bosnia’s complex legal framework, has arguably left the institution constantly at risk of interference from the executive and legislative branches of government.¹³⁶ In the current political dynamic, it is too easy for politicians to target the State Court and the Prosecutor’s Office to serve their broader political goals.

Bosnia and Herzegovina, H.E. Ambassador Dimitris Kourkoulas, Head of European Commission Delegation to Bosnia and Herzegovina, Media and Public Information Services, Citizens of Bosnia and Herzegovina, November 11, 2009, http://www.tuzilastvobih.gov.ba/files/docs/Otvoreno_pismoENG.pdf (accessed February 10, 2012).

¹³⁰ OSCE 2011 report, p. 90.

¹³¹ Human Rights Watch interview with court staff, Sarajevo, June 20, 2011; Human Rights Watch interview with representative of the Balkan Investigative Reporting Network (BIRN), Sarajevo, June 23, 2011; Human Rights Watch interview with two diplomats, Sarajevo, June 24, 2011; OSCE 2011 report, p. 90.

¹³² Human Rights Watch, *Looking for Justice*; Human Rights Watch, *Narrowing the Impunity Gap*.

¹³³ For instance, the websites of the State Court (<http://www.sudbih.gov.ba/?jezik=e>), the Prosecutor’s Office (<http://www.tuzilastvobih.gov.ba/index.php?jezik=e>), and the Registry (<http://www.registrarbih.gov.ba/index.php?opcija=sadrzaji&id=1&jezik=e>) contain a breadth of information about each institution’s work.

¹³⁴ Human Rights Watch interview with HJPC staff, Sarajevo, June 24, 2011; Human Rights Watch interview with diplomat, Sarajevo, June 24, 2011.

¹³⁵ OSCE 2011 report, p. 89. For instance, some victims’ groups have held protests in front of the court to express disappointment concerning the policy of provisional release pending trial. See “Victims’ protest turns into boycott,” Balkan Investigative Reporting Network, December 22, 2008, <http://www.bim.ba/en/147/10/15729/> (accessed February 13, 2012).

¹³⁶ See The General Framework Agreement for Peace in Bosnia and Herzegovina, initialed in Dayton, Ohio, 21 November 1995, signed in Paris, 14 December 1995, Annex 4 – Constitution of Bosnia and Herzegovina; OSCE 2011 report, p. 87.

Given profound weaknesses in the power-sharing structure between the entities that emerged from the war, concerted efforts by national politicians to exploit those weaknesses are perhaps unsurprising, particularly given longstanding political divisions in Bosnia along ethnic lines.¹³⁷ While the specifics may be different in other contexts, the increasingly volatile political landscape in Bosnia underscores the potential fragility of a state's political will to realize effective justice—in this situation, through international involvement in the Prosecutor's Office and the court—for serious crimes. The experience in Bosnia offers national authorities and donors valuable lessons on the role effective outreach can play in helping to better equip a judicial institution to withstand the winds of political change.

Beginning at an early stage, policymakers, donors, and national authorities should prioritize outreach as an important component of broader confidence-building initiatives aimed at increasing public understanding of criminal accountability processes. While donors have long recognized the value of outreach in the context of international judicial institutions, the need for it is not necessarily obvious for courts based in the country where the crimes took place. Situating the court closer to victims does not guarantee that its impact will be felt more acutely or its work better understood. If anything, the experience in Bosnia demonstrates the very real potential for national political actors to mount self-serving criticisms of judicial institutions conducting sensitive cases.

That is not to suggest that outreach is a panacea when it comes to building legitimacy for a judicial institution. Ultimately, a judicial institution's credibility rests—as it should—on the quality of justice it delivers. The importance afforded to accountability efforts is also subject to competing governmental priorities. At a minimum, however, without concerted efforts by the court and the prosecutor's office aimed at making a judicial institution's work accessible, understandable, and meaningful, its impact may be lost or, worse, easily distorted among those it was created to serve. An important lesson from Bosnia is that the court and the prosecutor's office should inform and engage the public on their respective work in order to shrink the space for attacks on these institutions that could otherwise more readily gain traction and flourish.

¹³⁷ See International Crisis Group, "Bosnia: State Institutions under Attack," Europe Briefing No. 62, May 6, 2011, [http://www.crisisgroup.org/~media/Files/europe/balkans/bosnia-herzegovina/B62%20Bosnia%20--%20State%20Institutions%20under%20Attack.pdf](http://www.crisisgroup.org/~/media/Files/europe/balkans/bosnia-herzegovina/B62%20Bosnia%20--%20State%20Institutions%20under%20Attack.pdf) (accessed February 15, 2012).

Prioritizing outreach involves many components. On the court side, in addition to sharing information about key decisions and developments in an understandable way, court officials should emphasize with the public the fair trial rights of defendants and the importance of due process. The court—and, where the prosecutor’s office is independent of the court, the prosecution—should have competent spokespersons to effectively and regularly engage with the media. On the prosecution side, as discussed earlier, the prosecutor’s office should develop and share with the public a prosecutorial strategy for prioritizing cases in order to manage expectations, operationalize the office’s commitment to transparency, and keep the public engaged in the office’s work. National authorities and donors should also ensure timely training for international and national judges and prosecutors about the value of outreach in order to foster their cooperation when it comes to devising and implementing effective outreach initiatives.¹³⁸ Donors and national authorities should also consider providing training to journalists on the particularities of reporting on atrocity cases (for instance, on the presumption of innocence and other rights of defendants) as a means of encouraging fair and responsible journalism.¹³⁹

For the most part, while international staff may be helpful in setting up a functioning outreach and public information section, outreach should ultimately be led by a national team of experts given their knowledge and understanding of the cultural context. Donors should lend their political support to keep outreach high on the national authorities’ agenda over a sustained period of time, and lend their financial support to implement outreach initiatives.¹⁴⁰

¹³⁸ Human Rights Watch interview with court staff, Sarajevo, June 21 and June 23, 2011; Human Rights Watch interview with diplomat, Sarajevo, June 24, 2011.

¹³⁹ Human Rights Watch interview with court staff, Sarajevo, June 21, 2011.

¹⁴⁰ Human Rights Watch interview with BIRN representative, Sarajevo, June 23, 2011; Human Rights Watch interview with diplomat, Sarajevo, June 24, 2011.

VI. Coordinating Accountability Efforts across Multiple National Courts

Trying atrocity cases in Bosnia has shed light on the complications associated with sharing jurisdiction between a central, temporarily internationalized court like the Bosnian War Crimes Chamber and the ordinary courts in the entities. A comprehensive assessment of the issue of sharing jurisdiction is beyond the scope of this report. Nonetheless, some preliminary lessons have emerged from Bosnia that could help inform efforts elsewhere to coordinate accountability efforts and donor resources across multiple national courts.

The War Crimes Chamber has concurrent jurisdiction over war crimes, crimes against humanity, and genocide with sixteen courts—ten cantonal and five district courts in the Federation of Bosnia and Herzegovina and the Republic of Srpska, respectively, and the district court in Brcko. While some progress has been made at the entity levels in handling cases, particularly in recent years, it has been slow and uneven.¹⁴¹ Not surprisingly, the specialized expertise and additional resources required (hiring more prosecutors and judges; putting in place witness protection and support measures; training prosecutors, judges, and defense attorneys on the applicable law; outfitting courts with a data management system to handle thousands of pages of documents; etc.) to process atrocity cases have proven to be significant obstacles when it came to prosecuting and trying cases in the entities.¹⁴²

In hindsight, several of those interviewed for this report questioned the necessity of vesting *all* sixteen cantonal and district courts with jurisdiction to handle war crimes, crimes against humanity, and genocide cases.¹⁴³ Another approach could have been to vest jurisdiction with those courts in areas where the most serious or the most numerous crimes were committed.¹⁴⁴ Identifying a smaller number of courts would make it easier for

¹⁴¹ Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts*, July 2008, 1-56432-341-2, http://www.hrw.org/sites/default/files/reports/bosniao708_1.pdf (“Still Waiting”); OSCE May 2011 report.

¹⁴² Human Rights Watch, *Still Waiting*.

¹⁴³ Human Rights Watch interview with OSCE staff, Sarajevo, June 21, 2011; Human Rights Watch interviews with two diplomats, June 22 and June 23, 2011; Human Rights Watch telephone interview with OHR staff, Sarajevo, June 30, 2011.

¹⁴⁴ This once again underscores the importance of mapping out the crimes committed during a conflict in a given situation early on to be able to make an informed decision about where justice is most needed, and where jurisdiction should be vested.

donors and national authorities to direct much-needed resources in coordination—rather than in competition—with those directed to a central internationalized court.

Concentrating jurisdiction for atrocity crimes in a smaller number of courts is a necessary but not sufficient condition for effective coordination among those courts.¹⁴⁵ There must be political will to develop and implement a coordinated approach to investigate, prosecute, and try cases. A tangible way to demonstrate this political will could be through the development of a national strategy aimed at making the most of available resources to secure accountability for atrocity crimes. Such a strategy could predict and analyze potential problems and propose solutions in a number of crucial areas such as allocating resources and cases between a central, internationalized court and other courts; developing even capacity to provide effective witness protection; providing adequate support for defense counsel (through training, access to evidence of international courts where relevant, etc.); and promoting outreach capacity. In Bosnia, it was not until early 2008 that the Bosnian authorities developed a written national strategy aimed at developing a more systematic approach to cases and allocating resources in war crimes cases.¹⁴⁶

The development and implementation of the national strategy in Bosnia have not been without critics or flaws.¹⁴⁷ Nonetheless, efforts to develop a strategy early on can stimulate much needed thinking and discussion around key areas concerning jurisdiction sharing, among other important areas that must be addressed to close the impunity gap.¹⁴⁸ Such a

¹⁴⁵ For instance, in Croatia, there were four specialized chambers mandated to try atrocity cases, but in practice, the bulk of cases are being handled in the ordinary courts. See Human Rights Watch, *Justice at Risk*; Amnesty International, "Behind a Wall of Silence: Prosecution of war crimes in Croatia," AI Index: EUR 64/003/2010, December 9, 2010, <http://www.amnesty.org/en/library/asset/EUR64/003/2010/en/81544213-9880-4a5e-acea-d5269d0bc8ad/eur640032010en.pdf> (accessed February 15, 2012).

¹⁴⁶ Some of the areas identified as problematic and which were the subject of the strategy include: the allocation and prioritization of cases, the protection and support of witnesses, and overall weak cooperation and coordination in processing war crimes cases both within Bosnia and among the countries of the former Yugoslavia. OSCE 2011 report, p. 17. National Strategy for War Crimes Processing, adopted by the Council of Ministers of Bosnia and Herzegovina, December 29, 2008, available in English at http://www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf (accessed February 15, 2012).

¹⁴⁷ There have been criticisms that the strategy was conceived as a purely political document rather than one aimed at providing meaningful guidance when it comes to investigating and prosecuting atrocity cases. See David Schwendiman, *Capacity Building*, pp. 202-203. In terms of its implementation, the OSCE report has noted its concern that the progress seen thus far is insufficient to meet the goal of resolving the top priority cases in the timeframe established by the strategy. Reasons contributing to the slow rate of implementation include: a fragmented legal and institutional framework applicable to war crimes cases; poor investment in human and technical resources; lack of availability of suspects, physical evidence, and witnesses willing to testify; and a caseload of unknown size and scope, scattered between prosecutors' offices around the country. See OSCE 2011 report, pp. 8, 14.

¹⁴⁸ Concluding such a strategy early on is also important to maximize the input of donors since that is when they are likely to be the most engaged in the process and will have the most leverage.

strategy can also be an essential expression of political will by the government to prosecute and fairly try atrocity cases, and provide a framework for donors to coordinate and target their support of national efforts. Its early adoption and meaningful implementation by the government and donors is central to maintaining a consistent and coordinated approach to justice for atrocity crimes.

Finally, where possible, national authorities should consider how to coordinate applicable laws and develop the judicial hierarchy. The introduction of the 2003 criminal code in Bosnia brought with it much uncertainty about the applicable law—in particular concerning whether the stricter penalties under the 2003 law should replace the more lenient maximum sentence available under the old criminal code.¹⁴⁹ Further, in Bosnia, the judicial system is markedly fragmented, with no hierarchy between the state and entity levels, a reflection of the post-Dayton compromise that ended the war.¹⁵⁰ Entity courts are therefore not obliged to apply the War Crimes Chamber’s decisions, limiting its influence in the development of consistent jurisprudence, which undermines its authority and legitimacy as a result.

In Bosnia, given the sensitivities and complexities involved in arriving at a power-sharing agreement to end the war, it may not have been possible to arrive at a different result. In other contexts, to the greatest extent possible, national authorities and donors should pay attention to how a central internationalized court fits into the overall judicial hierarchy with a view to securing its independence and maximizing its impact.

¹⁴⁹ The issue of the applicable punishment in Bosnia is currently being reviewed by the European Court of Human Rights.

¹⁵⁰ OSCE 2011 report, p.32.

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JUSTICE FOR ATROCITY CRIMES

Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina

In recent years, there has been increasing recognition of the important role national courts have in post-conflict countries in holding to account in fair trials the perpetrators of war crimes, crimes against humanity, and genocide. Where there is national willingness to deliver justice but limited capacity, international support can be essential to bridge the gap. Based on research by Human Rights Watch in Bosnia in June 2011, this report highlights lessons from the temporary participation of international staff in the War Crimes Chamber in Bosnia and Herzegovina's State Court and in the Special Department for War Crimes of the Prosecutor's Office. These lessons may be especially relevant where international staff are deployed to bolster national authorities' capacity, independence, and impartiality.

While the accomplishments of the chamber and the prosecutor's office are significant—the court has completed more than 200 cases in its seven years of operation—this model of providing international assistance to national justice has not been without flaws. The report concludes that policymakers, donors, and the Bosnian authorities failed to maximize the impact of international staff in the transfer of expertise in bringing cases to trial and institution building. If these shortcomings had been addressed earlier the chamber and the Prosecutor's Office could have been in a better position to withstand the increasingly volatile political climate in Bosnia. The report also discusses the importance of devising a realistic plan to phase out international staff and to engage public opinion through effective outreach to help create a climate that favors justice through fair trials. Finally, the report analyses some of the challenges of coordinating accountability efforts across multiple national courts and offers preliminary suggestions on how to overcome those challenges with the resources available.